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October 7, 2004

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
2004 OCT 13 A 10: 35

By Fax & Mail To: 202/219-3923
Jeff S. Jordan
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 5522 (Campaign Legal Center Complaint Against Wisconsin Right to Life, Inc.)

Dear Mr. Jordan:

Wisconsin Right to Life, Inc. ("WRTL") encloses its *Response* to the *Complaint*, which was filed by the Campaign Legal Center.

Sincerely,

BOPP, COLESON & BOSTROM

James Bopp, Jr.
Richard E. Coleson

1 enclosure
c: Barbara L. Lyons

Federal Election Commission: MUR 5522

Response to *Complaint*

The Campaign Legal Center ("CLC") complains that Wisconsin Right to Life, Inc. ("WRTL") "has violated federal campaign finance laws." *Complaint* at ¶ 1. The Federal Election Commission ("FEC) asks for WRTL's response in MUR 5522, which is provided here.

Facts

The allegation is based on the presence of a small graphic box ("the link") on the home page of WRTL's website. *See Exhibit A*. To access the link, a viewer must first have Internet access and then choose to access the website by typing in the proper URL, www.wrtl.org. WRTL's website and the information behind the link do not come unbidden to any viewer as an advertisement over a television or radio station to which the viewer might be listening. Nor do they appear as an advertisement on the pages of a print publication the viewer might be reading. Nor do they appear as a banner ad or a paid link on some popular website the viewer might be viewing. Nor do they arrive in the complainant's email box as an unsolicited email. The viewer must decide to go the website and take active steps to do so.

Once on the website by choice, the viewer may see the link. The link contains the text "WRL-PAC Endorsed Candidates." If a viewer chooses to do so, the viewer may click on the link. At the time of the complaint, if the viewer chose to click on the link, and had Adobe Acrobat Reader properly installed, the click would have opened a PDF file listing Wisconsin Right to Life PAC ("WRTL-PAC") endorsements, including President George W. Bush. WRTL's website has since been redesigned, so that clicking on the link now leads to an intermediate page, *Exhibit B*, which contains a link to the PAC endorsement list. If the viewer chooses to click on that link to the PDF endorsement statement, the viewer may view *Exhibit C*, entitled "Endorsed Pro-Life Candidates." At the end is a disclaimer indicating that WRTL- PAC "authorized and paid for" the page and that it was "not authorized by any candidate or candidate's committee."

The website's "News Room" contains news releases, including a WRTL-PAC news release, at *Exhibit D*, that indicates that WRTL's endorsements were available to those receiving the press release by means of accessing the website, not by a listing in the news release.

At the time of the *Complaint*, August 27, 2004, the link box contained a picture of President Bush. The picture was removed some time ago. *See* attached printout, Exhibit A. As set out below, WRTL explains that its activity is constitutionally protected, including posting the picture.

Allegations

What is the violation alleged? The "Prayer for Relief" seeks a determination that WRTL has violated 2 U.S.C. § 441(a) and (b). There is no allegation or fact indicating any coordination with a federal candidate so as to involve the prohibition on corporate contributions at § 441b. As applicable to the facts, § 441b only prohibits corporate disbursements that constitute (1) "**independent expenditures**," i.e., payments for communications containing "express advocacy," *FEC v. Massachusetts*

Citizens for Life, 479 U.S. 238 (1986) (*MCFL*), and (2) "**electioneering communications.**" *See* 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a)-(b).

(1) Electioneering Communications. The *Complaint* alleges that WRTL "has posted its *electioneering communication* on its corporate website within thirty (30) days of the convention of the Republican Party's nominating convention." *Complaint* at ¶ 7 (emphasis added). But as demonstrated below, CLC does not understand what constitutes an electioneering communication.

(2) Independent Expenditures. That leaves the question of whether CLC believes that these facts constitute an independent expenditure. It acknowledges that WRTL may endorse candidates and may communicate its endorsements to WRTL's members and may also communicate those endorsements to the general public by a press release or press conference to WRTL's usual media contacts without making an independent expenditure. The *Complaint* notes that the photograph of Pres. Bush was on the link and that he was an endorsed candidate on the list accessed by clicking the link. But the *Complaint* stops short of saying that the text of the link combined with the photo constitutes express advocacy on WRTL's home page. The *Complaint* nowhere alleges that the mere existence of a link to a PAC's endorsements is express advocacy. The *Complaint* merely complains that WRTL has provided access by the public to WRT-PAC's endorsement list by means of a link on its website, *Complaint* at ¶¶ 1, 3, 5, 6, 7, 8.

WRTL responds that (I) There Is No Electioneering Communication and (II) There Is No Express Advocacy because (A) The Link and Picture Were Not Express Advocacy, (B) The Link to the Endorsement List Was Not an Independent Expenditure, and (C) Links Don't Equal Express Advocacy.

I. There Is No Electioneering Communication.

There is no electioneering communication here because the facts involve an Internet web page, which is not within the definition of the term and is explicitly excluded. Electioneering communication is defined as follows (bold and underlining emphasis added):

> **§ 100.29 Electioneering communication (2 U.S.C. 434(f)(3)).**
>
> (a) *Electioneering communication* means any *broadcast, cable, or satellite communication* that:
>
> (1) Refers to a clearly identified candidate for Federal office;
>
> (2) Is publicly distributed within 60 days before a general election for the office sought by the candidate; or within 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate, and the candidate referenced is seeking the nomination of that political party; and
>
> (3) Is targeted to the relevant electorate, in the case of a candidate for Senate or the House of Representatives.
>
> (b) For purposes of this section –
>
> (1) *Broadcast, cable, or satellite communication* means a communication that is publicly distributed by a **television station, radio station, cable television system, or satellite system.**

* * *

(3)(i) *Publicly distributed* means aired, broadcast, cablecast or otherwise disseminated for a fee through the **facilities of a television station, radio station, cable television system, or satellite system.**

* * *

(c) Electioneering communication **does not include** any communication that:

(1) Is publicly disseminated through a means of communication other than a broadcast, cable, or satellite television or radio station. For example, electioneering communication **does not include** communications appearing in print media, including a newspaper or magazine, handbill, brochure, bumper sticker, yard sign, poster, billboard, and other written materials, including mailings; **communications over the Internet**, including electronic mail; or telephone communications . . . .

Because merely reviewing the definition shows that this Internet communication is not an electioneering communication, this allegation is frivolous.

II. There Is No Independent Expenditure.

There also is no independent expenditure here. The controlling law requires that there be (1) express advocacy and (2) a disbursement of something of objective value.

The prohibition on independent expenditures at 2 U.S.C. § 441b (appended) bars a corporate "expenditure in connection with an election," which language was construed by the United States Supreme Court to require the same "express advocacy" construction it had employed in *Buckley v. Valeo*, 424 U.S. 1 (1976), to construe other vague and overbroad language. *MCFL*, 479 U.S. at 249. Consequently only an "expenditure" for an express advocacy communication is prohibited. This is acknowledged in the language of 11 C.F.R. § 114.2(a)-(b)(appended).

Section 441b prohibits corporate independent *expenditures*, which are *expenditures* containing express advocacy. 2 U.S.C. § 431(17). "Expenditure includes . . . any purchase, payment, distribution . . . or anything of value." *Id.* at § 431(9). So there must be a disbursement for something of value before there is an expenditure. As shown below cognizable "value" is not present where disbursements are minimal because restricting such disbursements would not be narrowly tailored to a compelling governmental interest.

In the following constitutional analysis, it is important to recall that when government acts to restrict political speech, it must have a compelling interest and its restrictions must be narrowly tailored to accomplish only that goal. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 657 (1990) (citing *Buckley*, 424 U.S. at 44-45). There are only two recognized compelling interests. In *Buckley*, 424 U.S. 1, the Supreme Court was concerned with large gifts resulting in *quid pro quo* corruption. In *Austin*, 494 U.S. 652, the Court was concerned with the corruption of the entire electoral process from an influx of money from the economic marketplace into the political marketplace. Only the interests announced in *Buckley* and *Austin* have been recognized as compelling interests to regulate electoral speech. *FEC v National Conservative Political Action Comm'n*, 470 U.S. 480, 496-497

(1985). And the government may not meet its burden with the "hypothetical possibility" of corruption, but it must provide actual evidence of corruption. *Id.* at 498; *accord United States v National Treas. Employees Union*, 513 U.S. 454, 475-76 (1995).

There is an extra layer of strict scrutiny that results from the unique medium involved, which by its nature poses no threat of corruption. In comments presented to the FEC in response to Notice 1999-24 (notice of inquiry and request for comments) and Notice 2001-14 (notice of proposed rulemaking), many commenters made a strong case that there is no justification for regulating the sort of Internet activity involved here at all because such activity simply does not present the risk of corruption. *See* <http://www.fec.gov/internet.html>. WRTL will not repeat all those argument here but will refer the FEC to those comments in general and attach the "*Comments*" of WRTL's counsel to the NOPR here as *Exhibit E* (without the original letterhead), which make a good case that by their nature the sort of activities involved here on the Internet do not pose any risk of corruption so that there simply is no constitutional warrant to restrict them and, consequently, that even the proposed rules on hyperlinks and website distribution of endorsement lists were unconstitutional.

Important to these arguments for no Internet regulation of this type of activity is the uniqueness of the Internet medium. The Supreme Court has recognized that "each medium of expression . . . may present its own problems." *Southeastern Promotions, Ltd v. Conrad*, 420 U.S. 546, 557 (1975). One distinctive feature is that the user must actively seek out the information on a website, unlike television, radio, or even the telephone (which regularly rings without request). *Reno v. ACLU*, 521 U.S. 844, 866 (1997). Another is that the Internet is a unique and "vast democratic fora" with a history of operating with little government regulation. *Id.* The *Reno* Court noted that the Internet "provides relatively unlimited, low-cost capacity for communications of all kinds," *id.* at 870, and "any person with a phone line can become a town crier" or "a pamphleteer." *Id.* This leveling effect of the Internet, where individuals can express themselves with minimal investment initially and no cognizable incremental cost for a particular communication, makes it unique, and the Supreme Court said that "our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." *Id.* "[T]he Internet is a unique and wholly new medium of worldwide human communications." *Id.* at 850.

In its January 4, 2000, comments on the Notice of Inquiry (1999-24), the AFL-CIO set out several factors that make the Internet unique and unsuitable for governmental regulation of the sort of activities at issue in the present MUR. (The whole of these comments contains a fruitful analysis applicable to the present facts.) "*First*, virtually any individual or group can produce and mass-distribute or make mass-available sophisticated material on the Internet." *Id* at 4. "*Second*, the Internet is not as invasive as radio or television" and "[u]sers seldom encounter content by accident." *Id* at 5 (quotation marks and citations omitted). "*Third*, the Internet is not a scarce means of communication with limited outlets." *Id.* "*Fourth*, the Internet accords no inherent advantage to any website or voice on it, whatever its source." *Id.* "*Fifth*, as indicated by these other features, access to and use of the Internet is extremely inexpensive, and becoming more so." *Id.* The same comments continue:

> In this regard, the Internet does not coexist easily with a critical factual premise underlying federal election law: that "virtually every means of communicating ideas in today's mass society requires the expenditure of money," and in particular, "[t]he

> electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech." *Buckley v Valeo*, 424 U.S. 1, 19 (1976). Indeed, the fundamentally democratic and leveling aspects of the Internet render it a potentially potent *counterweight* to concentrations of financial power in the political marketplace, and there is no apparent means at present by which corporations, unions or others can utilize their resources to dominate the medium.

Id at 5-6 (emphasis in original).

In *Reno*, the Supreme Court indicated that the First Amendment applies fully to the Internet and that there would consequently be a presumption of unconstitutionality on any restrictions: "we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship." 521 U.S. at 885.

In light of the unique and highly democratic nature of the Internet, and of the lack of corruption risk posed by the sort of activities at issue here, it was highly appropriate for the FEC to ask, in Notice 1999-24, "whether campaign activity conducted on the Internet should be subject to the Act and the Commission's regulations at all." 64 Fed. Reg. 60361. At least for the present sort of Internet activity in this case, the answer must be "no."

A. The Link Text and Picture Were Not Express Advocacy.

Express advocacy is "explicit words" that "in express terms advocate the election or defeat of a clearly defined candidate for federal office. *Buckley*, 424 U.S. at 43-44. This express advocacy test requires "communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" *Id.* at 44 n.52.

Clearly WRTL's home web page contains no such words. The now-absent picture of President Bush was clear enough to meet the "clearly identified candidate" part of the express advocacy test. But the remainder of the text in the link is merely "WRL-PAC Endorsed Candidates." It does not say to vote for or against Bush, nor support or oppose him, nor even whether he is endorsed. There are no "explicit words" that "advocate [his] election or defeat." Consequently, there was no express advocacy in the text of the link, even when it had a picture, so there was no independent expenditure on the home page of WRTL's website.

B. The Link to the Endorsement List Was Not an Independent Expenditure.

Was the link to the endorsement list, which is available to the general public, an independent expenditure?

The FEC regulation at 11 C.F.R. § 114.4(c)(6) provides two safe havens and a secondary safe haven for endorsement lists, implicitly recognizing that where disbursements are de minimis, there is not really a cognizable "expenditure," i.e., there is no cognizable "value" disbursed (emphasis added):

(6) Endorsements. A corporation or labor organization may endorse a candidate and may communicate the endorsement to its restricted class through the publications described in 11 CFR 114.3(c)(1) or during a candidate appearance under 11 CFR 114.3(c)(2), provided that no more than a *de minimis number of copies* of the publication which includes the endorsement are circulated beyond the restricted class. The corporation or labor organization may publicly announce the endorsement and state the reasons therefor, in accordance with the conditions set forth in paragraphs (c)(6)(i) and (ii) of this section. The Internal Revenue Code and regulations promulgated thereunder should be consulted regarding restrictions or prohibitions on endorsements by nonprofit corporations described in 26 U.S.C. 501(c)(3). (i) The public announcement of the endorsement may be made through a press release and press conference. *Disbursements* for the press release and press conference shall be *de minimis*. The disbursements shall be considered de minimis if the press release and notice of the press conference is distributed only to the representatives of the news media that the corporation or labor organization customarily contacts when issuing non-political press releases or holding press conferences for other purposes. (ii) The public announcement of the endorsement may not be coordinated with the candidate, the candidate's agents or the candidate's authorized committee(s).

The first safe haven applies to publications sent to the restricted class or to appearances by candidates before the restricted class. In such a case, corporations may distribute endorsement publications to the restricted class, provided there is a "de minimis" circulation beyond the class. This safe haven applies only in the context of communications to the restricted class, allowing for some limited spill-over. There is no secondary safe haven describing what is de minimis in this context.

The second safe haven applies where there is a "press release and a press conference." This application applies to communications strictly beyond the restricted class and applies whether or not there is a communication to the restricted class. Disbursements for these activities must be "de minimis." There is a secondary safe haven here for what will be automatically be considered "de minimis" in this context, i.e., if the "press release and notice of the press conference [are] distributed only to the [usual media contacts]."

Note that the secondary safe haven in the press release context is not required; it is only a safe harbor. There is a safe haven if the disbursement is merely de minimis, whether or not the release is limited to the usual media contacts. For example, if an environmental advocacy corporation were affiliated with a national group from which it received an email containing email addresses for media contacts not in the local affiliate's usual media address book, it could import those new press contacts before emailing a press release listing its endorsements and simply send the press release to the same address book with the imported names. The disbursement would not be protected by the secondary safe harbor for distribution to the usual media contacts, but it would be protected by the primary safe harbor because the disbursement would clearly be de minimis. If a secretary takes a few seconds to import some email addresses into an existing address book, or simply drops a list of them at the end of a text file (containing other email addresses) that then is copied and pasted into the "to" field of Outlook Express" or AOL, the dollar value of that time is virtually zero.

It is noteworthy that under the usual media safe haven, the distribution of the press release is out of WRTL's hands. It simply makes it available, and news reporters can make what use they want of it, based on their perceptions of its newsworthiness.

It is arguable that WRTL's link is permissible under these safe harbors. Both WRTL's press release that cross-references the link and the link itself are available to the restricted class, the press, and to such other website visitors as might choose to access the website and click on the link.

In terms of publishing the information to the restricted class, the website provides a way of doing so with de minimis cost. The safe haven in the above regulation does not bar distribution of the endorsement publication beyond the restricted class, rather it actually envisions that it will be so distributed by requiring only that such spill-over be de minimis. And there is no evidence that the spill-over of the publication beyond WRTL's restricted class is anything but de minimis by making it available through a link on the website. The publication is certainly not being sent to persons beyond the restricted class, so if someone else wants to see the PDF document, they must visit the website and follow the link.

As to the press release and news conference aspect, the cost of sending the press release and posting the link to an existing PDF document is de minimis. And news conferences often have spill-over beyond news media personnel because they are frequently held in accessible locations where members of the public can wonder in and out at will. In fact, news conferences often involve visiting experts or celebrities as part of the news conference, and such persons are not usually members of a local affiliate of an ideological organization. So some de minimis spill-over beyond news people would be common and expected. And just as members of the public can walk down the hall of a hotel to drop in on a news conference, or join one in progress on the steps of a federal court, visitors to the WRTL website can drop in on WRTL's press releases, including WRTL-PAC's endorsements. There is no evidence that such spill-over would be more than de minimis, just at the cost is. And spill-over of the *information* to the public, rather than to the news media, is not barred or press conferences would have to be closed affairs and news reporters would not be able to publish the information.

Of course, in AO 1997-16, the FEC relied on the above regulation to opine that a nonprofit, environmental advocacy group that made its endorsements available to the public on its website would be making an independent expenditure. The AO dismissed the argument that the expense was de minimis, insisting that the distribution beyond the segregated class also had to be de minimis. *Id* at 6 (using pagination as printed from FEC website).

But the regulation actually required that there be a "de minimis *number of copies* of the publication . . . circulated beyond the restricted class" (emphasis added), not "de minimis circulation outside the restricted class," as the AO put it. *Id.* The concern about number of copies would be primarily an *expenditure* concern (parallel to the expenditure concern regarding press releases and press conferences), which is what the statutory scheme focuses upon. For the definition of what is an independent *expenditure* requires a focus on whether there was a cognizable disbursement (containing express advocacy), and the whole focus of the endorsements exception, which can only have authority if based on the statute, must similarly be on de minimis disbursements, not on distribution of the information. If distribution of the information were impermissible, then press releases would have to be barred, and

there would have to be penalties for permitting information imparted to members to fall into the purview of non-members.

While the endorsement regulation and Advisory Opinion 1997-16 may provide safe harbors, they are not the controlling analysis. The controlling analysis is that provided by the Supreme Court's First Amendment question outlined above, which requires that restrictions on free speech be narrowly tailored to a compelling governmental interest, and the statutory definition of expenditure, which requires a cognizable disbursement. As demonstrated in the *Comments* attached as *Exhibit E*, there is no cognizable "value" in creating a link or adding a graphic, and consequently there is no risk of harm to either of the compelling interests outlined *supra*. *Comments* at 1-3, 4, 6-11.

C. Links Don't Equal Express Advocacy.

Recent FEC proposed rules provide a persuasive argument that the express advocacy WRTL-PAC's endorsement listing, which may be retrieved (now in two steps) by clicking on the link, is not attributable to WRTL's home page because of the link. After soliciting and digesting a high volume of comments from interested groups, the FEC issued, on February 14, 2002, proposed rules on whether a hyperlink on a corporation or union web site constitutes a contribution or an expenditure. Based on analysis of numerous perspectives, the FEC came up with the following proposed rule:

> **§ 117.2 Hyperlinks from corporation or labor organization web sites.**
>
> (a) Notwithstanding the provisions of § 114.1(a) of this chapter, the establishment and maintenance of a hyperlink from the web site of a corporation or labor organization to the web site of a candidate, political committee or party committee for no charge or for a nominal charge is not a contribution or expenditure, provided that:
>
> (1) The corporation or labor organization does not charge or charges only a nominal amount for providing hyperlinks to other organizations;
>
> (2) The hyperlink is not coordinated general public political communications under § 100.23 of this chapter; and
>
> (3) The following materials do not expressly advocate under § 100.22 of this chapter:
>
> (i) The image or graphic material to which the hyperlink is anchored; and
>
> (ii) The text surrounding the hyperlink on the corporation or labor organization's web site, other than the text of a Uniform Resource Locator to which the link is anchored.
>
> (b) The exception in paragraph (a)(1) of this section applies even if the corporation or labor organization selectively provides hyperlinks to one or more candidate(s), political committee(s), or political parties without providing hyperlinks to any opposing candidate(s), political committee(s) or political parties.

66 Fed. Reg. 50365-66.

The rule is instructive. WRTL isn't linking to candidate or party web sites, so there are no issues of coordination. But *a fortiori*, if WRTL could link to such sites, or to other PAC sites, it can link to its own PAC's information. WRTL provides six "Key Pro-Life Links" in the lower right-hand corner of its

home page, for which it charges the organizations nothing. The link's image (now gone) and text do not expressly advocate, as already discussed above.

While the FEC has never promulgated the proposed regulation, it provides a useful analysis showing that WRTL's link on its homepage does not constitute express advocacy. With the WRTL-PAC page paid for by the PAC, WRTL has not placed any express advocacy on its home-page or website. Absent any express advocacy, there is no independent expenditure.

The Fifth Circuit's decision in *Chamber of Commerce of the U.S. v. Moore*, 288 F.3d 187 (5th Cir. 2002), provides clear guidance on the issue of hyperlinks. In 2000, the Chamber ran four thirty-second television ads discussing candidates for the Mississippi Supreme Court. At the conclusion of the ads was displayed "www.LitigationFairness.Org," where there were links to campaign web sites and biographical information. *Id.* at 190-91. Mississippi argued that even if the ads did not contain express advocacy, so as to be independent expenditures in themselves, the referenced website had links to campaign websites that did contain express advocacy, which Mississippi argued was indirect advocacy attributable to the Chamber's website and to the Chamber. The Fifth Circuit dismissed this argument as "too tenuous": "However, the LitigationFairness.org site did not itself contain any statements advocating the election or defeat of candidates. As a result, we find that the connection between the advertisements and the candidates' official sites is simply too tenuous to make the advertisements 'express advocacy.'" *Id.* at 198.

Conclusion

For the reasons stated herein, and in the attached *Comments*, the complaint should be disregarded, no FEC investigation or enforcement action should be conducted, and MUR 5522 should be closed.

Respectfully submitted,

BOPP, COLESON & BOSTROM

James Bopp, Jr

Richard E. Coleson

2 U.S.C. § 441b(a)-(b)(2)

§ 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 12(h) of the Public Utility Holding Company Act (15 U.S.C. 79l(h)), the term "contribution or expenditure" includes a contribution or expenditure, as those terms are defined in section 301 (2 U.S.C. § 431), and also includes any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section or for any applicable electioneering communication, but shall not include

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

11 C.F.R. § 114.2(a)-(b)

§ 114.2 Prohibitions on contributions and expenditures (emphasis added).

(a) National banks and corporations organized by authority of any law of Congress are prohibited from making a contribution, as defined in 11 CFR 114.1(a), in connection with any election to any political office, including local, State and Federal offices, or in connection with any primary election or political convention or caucus held to select candidates for any political office, including any local, State or Federal office. National banks and corporations organized by authority of any law of Congress are prohibited form making expenditures as defined in 11 FR 114.1(a) for communications to those outside the restricted class ***expressly advocating the election or defeat of one or more clearly identified candidate(s)*** or the candidates of a clearly identified political party, with respect to an election to any political office, including any local, State or Federal office.

(1) Such national banks and corporations may engage in the activities permitted by 11 CFR part 114, except to the extent that such activity is foreclosed by provisions of law other than the Act.

(2) The provisions of 11 CFR part 114 apply to the activities of a national bank, or a corporation organized by any law of Congress, in connection with local, State and Federal elections.

(b)(1) Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR part 100, subpart B. Any corporation whatever or any labor organization is prohibited from making a contribution as defined in 11 CFR 114.1(a) in connection with any Federal election.

(2) Except as provided at 11 CFR 114.10, corporations and labor organizations are prohibited from:

(i) Making expenditures as defined in 11 CFR part 100, subpart D;

(ii) Making expenditures with respect to a Federal election (as defined in 11 CFR 114.1(a)), for communications to those outside the restricted class that expressly advocate the election or defeat of one or more clearly identified candidate(s) or the candidates of a clearly identified political party; or

(iii) Making payments for an electioneering communication to those outside the restricted class. However, this paragraph (b)(2)(iii) shall not apply to State party committees and State candidate committees that incorporate under 26 U.S.C. 527(e)(1), provided that:

(A) The committee is not a political committee as defined in 11 CFR 100.5;

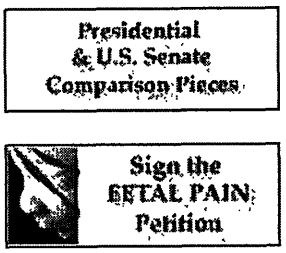
(B) The committee incorporated for liability purposes only;

(C) The committee does not use any funds donated by corporations or labor organizations to make electioneering communications; and

(D) The committee complies with the reporting requirements for electioneering communications at 11 CFR part 104.

Wisconsin Right to Life

WRL-PAC ENDORSED CANDIDATES



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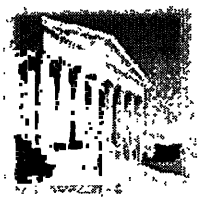
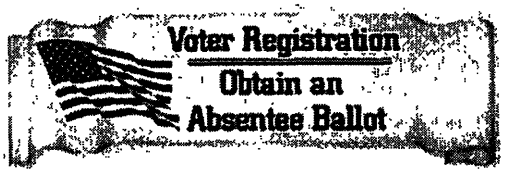


U.S. Supreme Court Chief Justice Rehnquist Orders FEC to Respond to Wisconsin Right to Life Injuction Application

To read more about Wisconsin Right to Life's challenge of McCain-Feingold, Visit BeFair.org.

09/10/04 -- In Wisconsin Right to Life's McCain-Feingold Challenge, Chief Justice Rehnquist Orders FEC to Respond to Injunction Application Read more...

Employment Opportunity: Associate Executive Director position available with the Wisconsin Right to Life state office Click for more details.



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search wrtl org

Wisconsin Right to Life 10625 W North Ave Ste LL, Milw,WI 53226 (414) 778-5780

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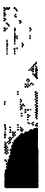

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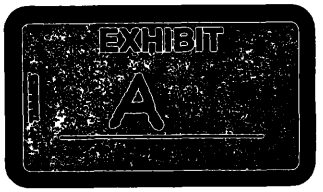

Wisconsin Right to Life

Endorsed Candidates

The Wisconsin Right to Life PAC (Political Action Committee) has endo the pro-life candidates listed on the document below for the Tuesday, November 2, 2004 General Election.

You may download, view (and print) this PDF document.

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10625 W North Avenue Suite LL - Milwaukee WI 53226-2331 (414) 778-5780

EXHIBIT B

Wisconsin Right to Life

Wisconsin Right to Life 10625 W. North Ave , Ste LL, Milwaukee, WI 53226—2331
(414) 778—5780 www.wrtl.org Email. legis@wrtl.org

Endorsed Pro-Life Candidates

For the Tuesday, November 2 General Election

The Wisconsin Right to Life PAC (Political Action Committee) has endorsed the candidates listed below. Candidates noted with an asterisk (*) have received a qualified endorsement. A candidate who is seeking re-election to the same office is identified as an "Incumbent."

President — George W. Bush (R) Incumbent

U.S. Senate —
Tim Michels (R)

U.S. House of Representatives —
1st CD — Paul Ryan (R) Incumbent
3rd CD — Dale Schultz (R)*
4th CD — Gerald H. Boyle (R)

5th CD — F. James Sensenbrenner, Jr. (R) Incumbent
6th CD — Tom Petri (R) Incumbent
8th CD — Mark Green (R) Incumbent

Wisconsin State Senate

2nd State Senate District — Robert Cowles (R)* Incumbent
10th State Senate District — Sheila Harsdorf (R)* Incumbent
12th State Senate District — Roger Breske (D) Incumbent
14th State Senate District — Luther Olsen (R)
16th State Senate District — Eric Peterson (R)
18th State Senate District — Carol Roessler (R) Incumbent
20th State Senate District — Glenn Grothman (R)
22nd State Senate District — Reince Priebus (R)
24th State Sentate District - Greg Swank (R)
28th State Senate District — Mary Lazich (R) Incumbent
30th State Senate District — Gary Drzewiecki (R)
32nd State Senate District — Dan Kapanke (R)

Wisconsin State Assembly
1st Assembly District — Garey Bies (R) Incumbent
2nd Assembly District — Frank Lasee (R) Incumbent
3rd Assembly District — Al Ott (R) Incumbent
4th Assembly District — Phil Montgomery (R) Incumbent
5th Assembly District — Becky Weber (R) Incumbent

EXHIBIT C

7th Assembly District — Peggy Krusick (D)* Incumbent
13th Assembly District — Matt Adamczyk (R)
14th Assembly District — Leah Vukmir (R) Incumbent
15th Assembly District — Tony Staskunas (D) Incumbent
21st Assembly District — Mark Honadel (R) Incumbent
22nd Assembly District — R. Jay Hintze (R)*
23rd Assembly District — Curt Gielow (R) Incumbent
25th Assembly District — Bob Ziegelbauer (D) Incumbent
27th Assembly District — Steve Kestell (R) Incumbent
28th Assembly District — Mark Pettis (R) Incumbent
29th Assembly District — Andy Lamb (R)*
30th Assembly District — Kitty Rhoades (R)* Incumbent
31st Assembly District — Steve Nass (R)* Incumbent
32nd Assembly District — Thomas Lothian (R) Incumbent
33rd Assembly District — Daniel Vrakas (R) Incumbent
34th Assembly District — Dan Meyer (R) Incumbent
35th Assembly District — Don Friske (R) Incumbent
36th Assembly District — Jeffrey Mursau (R)

37th Assembly District — David Ward (R)* Incumbent
38th Assembly District — Joel Kleefisch (R)
39th Assembly District — Jeff Fitzgerald (R) Incumbent
40th Assembly District — Jean Hundertmark (R) Incumbent
41st Assembly District — Joan Ballweg (R)
42nd Assembly District — J.A. Hines (R) Incumbent
43rd Assembly District — Debi Towns (R) Incumbent
45th Assembly District — Brian Brown (R)
46th Assembly District — Nick Voegeli (R)
47th Assembly District — Eugene Hahn (R) Incumbent
49th Assembly District — Gabe Loeffelholz (R) Incumbent
50th Assembly District — Sheryl Albers (R) Incumbent
51st Assembly District — Stephen Freese (R) Incumbent
52nd Assembly District — John Townsend (R)* Incumbent
53rd Assembly District — Carol Owens (R) Incumbent
56th Assembly District — Terri McCormick (R) Incumbent
57th Assembly District — Steve Wieckert (R) Incumbent
58th Assembly District — Pat Strachota (R)

59th Assembly District — Dan LeMahieu (R) Incumbent
60th Assembly District — Mark Gottlieb (R) Incumbent
63rd Assembly District — Robin Vos (R)*
66th Assembly District — Samantha Kerkman (R) Incumbent
67th Assembly District — Jeff Wood (R) Incumbent
68th Assembly District — Terry Moulton (R)
69th Assembly District — Scott Suder (R) Incumbent
70th Assembly District — Daniel Mielke (R)
75th Assembly District — Chris Serio (R)
82nd Assembly District — Jeff Stone (R) Incumbent
83rd Assembly District — Scott Gunderson (R) Incumbent
84th Assembly District — Mark Gundrum (R) Incumbent
86th Assembly District — Jerry Petrowski (R) Incumbent
87th Assembly District — Mary Williams (R) Incumbent
88th Assembly District — Judy Krawczyk (R) Incumbent
89th Assembly District — John Gard (R) Incumbent
90th Assembly District — Karl Van Roy (R) Incumbent

91st Assembly District — David Anderson (R)
93rd Assembly District — Rob Kreibich (R)* Incumbent
94th Assembly District — Mike Huebsch (R) Incumbent
96th Assembly District — Lee Nerison (R)

97th Assembly District — Ann Nischke (R) Incumbent
98th Assembly District — Scott Jensen (R) Incumbent
99th Assembly District — Don Pridemore (R)

Wisconsin Right to Life

Wisconsin Right to Life PAC NEWS RELEASE
10625 W. North Avenue, Milwaukee, WI 53226
414-778-5780 or toll free: 877-855-5007

For immediate release: Thursday, July 28, 2004

Contact: Sue Armacost, Legislative Director

Wisconsin Right to Life PAC Endorsements and Right to Life Voting Records

Now Available at WWW.WRTL

The Wisconsin Right to Life Political Action Committee (WRL/PAC) today announced that the list of state and federal candidates endorsed by WRL/PAC for the primary election is available for viewing at www.wrtl.org The list of endorsements will be modified after the September primary election for the November general election. To access the list of WRL/PAC endorsed candidates, click on "WRL/PAC Endorsements" which appears on the left side of the website's homepage.

In addition, the site includes the right to life voting records of state legislators for the 2003-04 and the 2001-02 legislative sessions. A link to the right to life voting records of Wisconsin's U. S. Senators and members of the U. S. House Representatives is also provided. To access the voting records, click on "Find Out How They Voted" which appears on the left side of the website's homepage.

November 29, 2001

Rosemary C. Smith,
Assistant General Counsel
Federal Election Commission
999 E. Street, N.W.
Washington, DC 20463
Fax: 202/219-3923
Email: internetprm@fec.gov

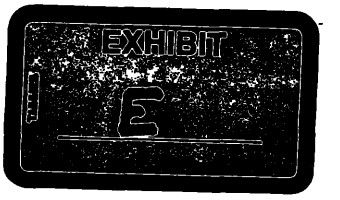
Re: Proposed Rules regarding Internet campaign activity

Dear Ms. Smith:

We send with this (by fax, mail, and email) the *Comments on Proposed Rules at 11 C.F.R. Parts 100, 114 and 117, The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations* by the James Madison Center for Free Speech (in response to a notice published at 66 Fed. Reg. 50358, October 3, 2001), incorporated herein by reference. Notice is hereby given that Mr. James Bopp, Jr., General Counsel for the James Madison Center for Free Speech, wishes to testify orally concerning the proposed rulemaking in the event a hearing is scheduled on this matter.

I. The Spectrum of Campaign Activity and the Measurement of "Value"

The Supreme Court and the FEC have recognized that there is a large spectrum of activity which encompasses "campaign activity." On one pole of the spectrum is the recognition that "resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace." *FEC v. Massachusetts Citizens for Life, Inc.* ("*MCFL*"), 479 U.S. 238, 257 (1986). Thus, the government may constitutionally restrict corporations' campaign activities to prevent the corruption of the electoral process by the seemingly unlimited expenditure of corporate funds into the political marketplace. On the other end of the spectrum is *de minimis* activity which poses little, if any, threat to the electoral process and is consequently not regulated. The FEC has recognized that some campaign activity inherently lacks the prerequisite value to be regulated. For example, 11 C.F.R. § 114.9, the "Occasional Use Exemption",



allows for "occasional, isolated, or incidental use" of corporate or labor organization facilities in connection with a federal election without regulation.

Apparent in the FEC's proposed rule is the presumption of "value" that is attached to hyperlinks, candidate endorsements, or other Internet campaign activity. A hyperlink, candidate endorsement, or individual Internet campaign activity can only be deemed a contribution or expenditure if it is of "value." It becomes necessarily vital to establish an accurate method by which one calculates "value." There are two accurate means by which this may be done. First, the FEC may calculate the "value" of Internet campaign activity in the same manner it does for several other activities -- by assessing the market value of the activity in question.[1] The market value provides an accurate and objective determination of the true monetary worth of any given Internet campaign activity. Second, the FEC may calculate "value" as a measure of the actual cost an entity pays for a given service or product. Further, the Code of Federal Regulations incorporates both measures to determine "value."[2] As will become apparent under either approach, the Internet campaign activity at issue lacks any such determinable value due to its minimal worth.

In the proposed rules, the FEC seeks to regulate certain Internet campaign activity based upon its potential value as a contribution or expenditure. Each Internet campaign activity highlighted in the proposed rules carries with it minimal cost or value. The FEC already recognizes the "occasional, isolated, or incidental use" by employees of corporate or labor organization facilities in connection with a federal election as an activity not subject to regulation. Such activities are presumably not subject to regulation because of their low-value and correspondingly low potential of corruption to the electoral process.

The evaluation of any campaign activity should not be based upon the subjective worth of the communication but rather upon its objective worth. The Occasional Use Exemption does not analyze the value of the use of an employer's facilities in connection with a federal election under a subjective evaluation. Rather, it evaluates whether such use is subject to regulation based on objective hourly data.[3] It does not matter if the use is subjectively more valuable because it is performed by a famous employee or the president of the corporation. It simply analyzes the value of the activity based on the number of hours of such use. Similarly, 11 C.F.R. 100.7(a)(1)(iii)(A)-(B) measures costs of goods or services based on the objective

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[1]One example of the FEC's use of an objective market standard to determine value is embodied in 11 C.F.R. § 100.7(a)(1)(iii)(A)-(B). This provision determines the value of advertising services by the "usual and normal charge" for such a service. Further, the "usual and normal charge" consists of the "hourly or piecework charge for the services at a commercially reasonable rate."

[2]11 C.F.R. § 100.7(a)(1)(iii)(A)-(B) typifies a market value approach, while 11 C.F.R. § 114.9(a)(iii) measures value according to the cost incurred by the entity.

[3]11 C.F.R. § 114.9(a)(iii) notes that "[a]ny such activity which does not exceed one hour per week or four hours per month . . . shall be considered as occasional, isolated, or incidental use of the corporate facilities."

"usual and normal charge" standard. Likewise, any proposed regulation of Internet campaign activity should evaluate "value" not by the subjective importance of the Internet communication but by the objective costs associated with such a medium.

II. The Constitutional Framework Appropriate for Internet Campaign Activity

The beginning of any analysis regarding the regulation of political speech requires an introduction to the constitutional framework which governs such speech. In brief, two seminal cases provide much assistance with this effort. *Buckley v. Valeo*, 424 U.S. 1 (1976), and *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), lay the foundation for determining the constitutionality of rules which regulate campaign activity. Both cases allow for some regulation of campaign activity due to the threat of candidate corruption from large contributions or corruption of the electoral process by large influxes of money from corporations and labor unions.

Buckley and *Austin* establish the only recognized interests in restricting vital electoral speech. *Buckley* was concerned with multi-million dollar gifts, and a resulting *quid pro quo*, i.e., contributions for political favors. The *Austin* Court was concerned with the corruption of the entire electoral process from an influx of money from the economic marketplace into the political marketplace. Further, it is recognized that when government acts to restrict political speech, it must have a compelling interest which is narrowly tailored to accomplish such a goal. *Austin*, 494 U.S. at 657 (citing *Buckley*, 424 U.S. at 44-45). Only the interests announced in *Buckley* and *Austin* have been recognized as compelling interests to regulate electoral speech. *FEC v. National Conservative Political Action Comm'n*, 470 U.S. 480, 496-497 (1985).

In addition to regulating electoral speech, the FEC's proposed rules regulate speech that occurs in the medium of the Internet. In determining the constitutionality of a given restriction on speech, it is necessary to consider the medium in which such speech takes place. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (noting that every medium of expression "must be assessed for First Amendment purposes by standards suited to it.") Quite simply, the Internet represents the most particpatory marketplace of mass speech that this country has ever seen. *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1997) (Dazell, J., concurring), *aff'd*, 521 U.S. 844 (1997). The Internet is both a "a vast library including millions of readily available and indexed publications" and "a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers." *Reno v. ACLU*, 521 U.S. 844, 853 (1997). Unlike most other media formats[4], costs associated with speech on the Internet are minimal. As such, the Internet represents the greatest potential for an uninhibited and robust exchange of political speech. Such implications influenced Judge Dazell to note in his concurrence that "the Internet deserves the broadest possible protection from government-imposed, content-based regulation." *Reno*, 929 F. Supp. at 881.

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[4]The Supreme Court has noted that the justifications for the regulation of other broadcast media are not present in cyberspace. *Reno*, 521 U.S. at 866.

It is with such a framework in mind that one may properly analyze the constitutionality of the FEC's proposed rules. The FEC has proposed three such rules which would regulate campaign activity on the Internet. Each of the rules must have an accompanying compelling governmental interest that is carried out in a narrowly tailored manner. As is made evident below, it is doubtful that any of the proposed regulations satisfy so rigorous an examination.

III. A Constitutional Analysis of the Proposed Rules

A. None of the Proposed Rules Satisfy Constitutional Analysis Because Internet Costs are *De Minimis*

The FEC proposes three regulations of Internet campaign activity; each of which have a *de minimis* value associated with them. However, the animating rationale behind limiting corporations and labor unions from engaging in express advocacy is to protect the electoral process from corruption by limiting the influx of such organizations' money into the political marketplace. Thus, the proposed Internet campaign activity must pose a credible threat of such effect upon the electoral process. This threat is not present in Internet campaign activities because the associated costs, measured by either market value or the price the entity pays, are so low as to be nearly immeasurable. Reviewing these costs demonstrates the nominal monetary amounts involved in such endeavors. The Internet then, in effect, becomes a level playing field for political speech. With the advent of frequent free web space and free Internet access, the Internet has become a medium in which entry costs are not a barrier for most. As contrasted to other traditional media outlets, where most individuals have little chance to speak due to financial barriers, the Internet eliminates the risk of corporations monopolizing the political marketplace with their voice. Accordingly, the rationale to limit corporate political speech evaporates in the medium of the Internet.

The FEC should not regulate the Internet campaign activity contemplated in the proposed rules because it, like other limited recognized campaign activity, carries only a *de minimis* value. The market price or cost to an entity of a hyperlink or other Internet campaign activity undeniably reflects the objective value of the link. It has become exceedingly clear that, with the continued dramatic increase in the size of the Internet, associated Internet campaign activity cost is minimal, especially in such areas as hyperlink and press release creation.

B. Each of the Proposed Rules are Not Justified

1. The Individual Exemption

The first proposed rule[5] exempts individual Internet campaign activity from constituting a contribution or expenditure in certain instances. However, it also notes that if an individual engages in "Internet activity for the purpose of influencing any election" with "equipment, services, or software owned by an individual's employer" that such activity may be considered a contribution or expenditure. 66 Fed. Reg. at 50,362. The proposed rule goes on to note that even volunteer activity on the employee's own time may be subject to such regulation. *Id.*

The James Madison Center for Free Speech applauds the FEC's adoption of the"occasional, isolated, or incidental" exemption embodied in 11 C.F.R. § 114.9 as applied to an employee's use of a corporation's or labor organization's technological resources. *Id.* However, there is one further potential use of corporate or labor organization technological resources that should be accounted for in the proposed regulation. While the "occasional, isolated, or incidental" use exemption protects employees engaged in individual political speech completed with corporate or labor organization resources, it does not adequately protect individuals who are given corporate property as part of their compensation package. The "occasional, isolated, or incidental" use exemption did not contemplate the advent of the "home office" where corporations give employees resources as part of a compensation package to use both personally and professionally.

Often, corporate employees are given a notebook computer for both business and personal use. As such, the notebook is given as part of a compensation package and is almost indistinguishable from other related benefits such as a corporate automobile. However, such computers are often paid for by, and registered in the name of, the corporate entity. It then becomes challenging to address how the regulation of an individual's Internet campaign activity, which takes place on a quasi-personal notebook computer, advances any interest in restricting the overwhelming corporate voice in the electoral process. Such a rule regulates *individual* speech published through corporate resources; it does not regulate the influx of corporate and labor organization expenditures into the electoral process. Under such a rationale, the FEC could regulate individuals' campaign uses of corporate automobiles or could require individuals to pay for campaign activities with personal funds not derived from a corporate entity.[6]

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[5]The Internet and Federal Elections; Candidate-Related Materials on Web Sites of Individuals, Corporations and Labor Organizations, 66 Fed. Reg. 50,358, 50,362 (2001) (to be codified at 11 C.F.R. 117.1) (proposed Oct. 3, 2001).

[6]The FEC effectively claims that it may broadly regulate an individual's campaign activity that is

(continued...)

In order for the FEC to constitutionally regulate this type of Internet speech, it must have a compelling interest which is narrowly tailored. *Austin*, 494 U.S. at 657 (citing *Buckley*, 424 U.S. at 44-45). The restriction of mass corporate money into the political marketplace represents one such valid compelling governmental interest in preventing the corruption of the electoral process. *Id.* at 660. It is problematic to assume that a regulation on individual electoral speech through quasi-personal corporate technological resources somehow advances the government's interest in shielding the political marketplace from the massive corporate voice. There is virtually no risk of corrupting the electoral process by allowing a corporate or labor organization's employee to freely and independently engage in electoral Internet speech. Such a regulation may effectively silence or hinder the political speech of citizens who are given corporate resources as part of a compensation package.

The proposed rules also require a clarification of the phrase to "engage in Internet activity for the purpose of influencing any election." As written, it is unclear what type of communications are covered under the "for the purpose of influencing" language. "[F]or the purpose of influencing" should apply to both issue advocacy and express advocacy communications. The Supreme Court recognized a distinction between issue advocacy and express advocacy in *Buckley* for purposes of constitutional analysis. 424 U.S. at 79-80. Express advocacy includes explicit or express words of election or defeat of a clearly identified candidate. *Id.* at 44. Issue advocacy lacks explicit words of election or defeat but otherwise praises or criticizes a candidate for his or her position on a given issue. *MCFL*, 479 U.S. at 249. *Buckley* interpreted "to influence" to mean express advocacy. 424 U.S. at 79-80. Therefore, the FEC should expand its proposed rules to include an expanded definition of "for the purpose of influencing any election." The definition should extend to cover both issue advocacy and express advocacy as this would provide clarity to the proposed rule and would allow individuals to engage in either type of speech.

2. Regulated Hyperlinks

The second proposed rule[7] seeks to clarify the regulation of hyperlinks on corporation and labor organization web sites. Three conditions must be met so that such a hyperlink is not considered a contribution or expenditure. The last such condition requires that if the "hyperlink is anchored to an image or graphic material, that material may not expressly advocate" and the "text surrounding the hyperlink... may not expressly advocate." 66 Fed. Reg. at 50,364. It is precisely this limitation which fails to pass constitutional muster as it does not address any interest in preventing corruption of the electoral process.

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[6](...continued)
tangentially related to corporate resources. Under this reasoning the FEC could claim to regulate corporate automobile usage and individual salary expenditures in relation to campaign activities because of the link between the corporate resources and the campaign activity. Such an expansive reading of the basis for the FEC's regulatory power unduly infringes upon individuals' First Amendment rights.

[7]66 Fed. Reg. at 50,364 (to be codified at 11 C.F.R. 117.2).

a. Hyperlinks Possess Very Little Value and Consequently Should not be Regulated

The animating rationale behind limiting corporations and labor unions from engaging in express advocacy is to protect the electoral process from corruption by limiting the influx of such organizations' money into the political marketplace. *Austin*, 494 U.S. at 660. In order for such a proposed rule to comport with this rationale, it must identify the value, or monetary worth, of a hyperlink and its alleged threat of corruption to the electoral process. Hyperlinks, by their very nature, possess little ascertainable value. In fact, the creation of a hyperlink carries a *de minimis* value and is directly comparable to the "occasional, isolated, or incidental use" exemption embodied in 11 C.F.R. § 114.9. As an example, the creation of a hyperlink simply requires an individual to type <A HREF = "http://www.domainname.com"> title </A>. The effective cost of this hyperlink is exceedingly low and carries an approximate value of eighty-five cents.[8] The FEC should recognize the *de minimis* value of Internet campaign activity and the proposed rules should not seek to regulate it because of the minimal threat of corruption associated with such low-value activities.

The FEC's proposed rule explicitly states that "the hyperlink will only be exempt if the corporation or labor organization does not charge or charges only a nominal amount for providing hyperlinks to other organizations." 66 Fed. Reg. at 50,364. Yet the proposed rule goes on to regulate such extremely low value activity. Other *de minimis* campaign activities, such as the "occasional, isolated, or incidental use" exemption, are not regulated precisely due to their inherently low value. Because hyperlinks are of infitesimal value, they pose no threat to the electoral process and should not be regulated; just as other campaign activities of *de minimis* value are not subject to regulation.

b. The Threat of Corruption Through Express Advocacy Hyperlinks is Minimal

That a corporation may include express advocacy in an anchored graphic or in text surrounding a link does not pose a threat of corruption to the electoral process. Corporate entities or labor organizations will not monopolize and flood the political marketplace by producing "express advocacy hyperlinks" on their web sites. As such, the proposed rule does not directly advance a governmental interest in preventing the corruption of the electoral process. The FEC should not regulate corporations' or labor organizations' use of hyperlinks at all but should rather exempt all such hyperlinks from regulation under a *de minimis* exception.

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[8]The median salary for content engineers in Chicago, Illinois is $67,284. *Salary.com Salary Wizard* (visited November 15, 2001) <http://www.salary.com>. If the engineer types thirty words per minute, a low figure, it would take him 1.47 minutes to type the forty-four character hyperlink. The engineer is effectively paid $35.33 an hour. As such, the engineer makes fifty-eight cents a minute. Thus, 1.47 minutes of his time creating the hyperlink has a value of eighty-five cents. Other costs do, of course, factor into determining the value of a hyperlink but many of them are sunken costs, e.g. they are already paid for, such as server and storage costs or bandwidth allocations.

3. Candidate Endorsement Press Releases

The third proposed rule[9] allows for corporations to make press releases endorsing candidates in certain situations. Specifically, only a corporation which "ordinarily makes press releases available to the general public on its web site" may endorse candidates. 66 Fed. Reg. at 50,365. The proposed rule also seeks to limit the press release to the endorsement and reasons for the endorsement. *Id.* Any such press release must be "made available in the same manner as other press releases made available on the web site." *Id.* Lastly, the associated costs must be *de minimis*. *Id.* The proposed rule allows limited candidate endorsement by corporations but, in doing so, unduly restricts many corporations' ability to speak as well as the manner in which such speech may occur.

a. Internet Press Releases are Inexpensive and Should not be Regulated

The objective cost of an Internet press release, like the creation of a hyperlink, is exceedingly minimal. While the creation of a hyperlink may take 1.47 minutes, an individual web page would normally include hundreds of plain-text characters along with several hyperlinks. Further, there are at least two methods by which the value of a single web page could be calculated. One could calculate the cost to the entity based upon the earlier assumption of an in-house content engineer. It is most likely that a content engineer would take a pre-written press release and convert it to Hypertext Markup Language ("HTML") for posting. One could speculate that with today's advanced HTML editors encompassed in popular software office suites that the task of creating a simple press release could be completed in less than five minutes. Assuming the same hypothetical content engineer converted a press release into an HTML version and published it in 5 minutes, the press release would have an associative cost of $4.25 plus initial drafting costs.[10]

One could also calculate the cost of creation based upon the average market price for web page services. However, this rate would undeniably be higher than the average corporation's cost as the calculation involves the use of third-party content engineers or web publishers. Given the resources and technologies of corporations, it is doubtful that a corporation would outsource its web site maintenance to a third party when it could be completed more efficiently in-house. Assuming a corporation did contract for third party web site maintenance, a random sampling of ten web site companies demonstrates that the price for an individual HTML page ranges from between fifteen and one hundred dollars.[11] In contrast to the

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[9]66 Fed. Reg. at 50,364 (to be codified at 11 C.F.R. 117.3).

[10]This is based on the content engineer earning fifty-eight cents per minute.

[11]The following sites constituted the random sampling and prices reflect the cost to create an
(continued...)

accepted theory that a corporation's political speech may be restricted to prevent its massive influence in an election, an expenditure for HTML page creation is of *de minimis* value. As demonstrated, HTML page creation costs little, is a relatively easy entry point of communication for all speakers and the policy considerations to justify limiting other forms of corporate political speech simply are not present here.

Just as present regulations currently recognize that other activities which possess minimal value or threat of corruption should not be regulated, so to should the proposed rules. In order for the proposed rules to constitutionally regulate the issuance of candidate endorsement press releases, the government must have a compelling interest in regulating them. *Austin*, 494 U.S. at 657 (citing *Buckley*, 424 U.S. at 44-45). Such interest, as noted earlier, is normally associated with preventing corruption of the electoral process by prohibiting the large influx of money into the political marketplace. The creation of a single candidate endorsement press release, or several, carries minimal value. Thus, the government lacks a compelling interest to regulate such speech as there is no threat of corruption in a medium which is so inexpensive and which, through its low-cost characteristics, is completely open to a diverse array of voices, none of which has the potential to monopolize the medium.

b. The Rule Fails to Survive Constitutional Scrutiny

The FEC proposes that corporations which have made press releases available to the general public in the past may now make press releases which endorse candidates. 66 Fed. Reg. at 50365. However, corporations which have not made press releases available to the public in the past are presumptively not allowed to make such endorsements. It is unclear what compelling governmental interest, if any, is advanced by prohibiting corporations which have not made public press releases before from issuing candidate endorsement press releases. The prevention of corruption does not justify restricting corporations which have not previously made press releases from endorsing candidates. The proposed rule irrationally and unconstitutionally distinguishes between corporations which have made public press releases available and those that have not; a distinction not supported by any compelling governmental interest.

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[11](...continued)
individual HTML page: http://www.custombizsites.com ($75), http://www.frontierix.com ($60), http://www.accesscomputing.com/az/index.htm ($35), http://www.engineers.com/web.htm ($50), http://www.lightcreations.com/pricing.html($15), http://www.welcome2premier.com/premier_web_services/pwprices.html ($15), http://www.webcreationservices.com/pricing.htm ($75), http://www.sitesbysteve.com/fees.html ($100), http://www.tucsonwebcreation.com/web_design_pricing_and_services.htm ($25), http://www.mclaughlinwe.com/price.htm ($20).

The FEC also seeks to limit the content of the press release to solely the endorsement and a "statement of the reasons therefore." *Id.* It remains unclear what compelling governmental interest is addressed by restricting the content of the endorsement to the endorsement itself and supporting rationale. Generally, a corporation would select only relevant topics to include in its press release endorsing a candidate; irrelevant information would be excluded. Accordingly, it makes little constitutional sense for the FEC to propose to regulate the content of a candidate endorsement. If a corporation wishes to create a press release endorsing a candidate and extolling the benefits of a product, so be it. The electoral process is not endangered by an overwhelming corporate voice simply because a corporation chooses to include additional information into an endorsement. Thus, the proposed content-based limitation must fail due to constitutional infirmity.

The proposed rule would regulate the manner in which an endorsement press release is published by requiring organizations to make it "available in the same manner as other press releases made available on the web site." *Id.* Again, this proposed rule creates a content-based restriction on candidate endorsements. As addressed earlier, what compelling governmental interest is served by restricting the manner in which a corporation publishes an endorsement? New formats of press releases do not threaten to corrupt the electoral process.

Lastly, the FEC requires candidate endorsement press release costs to be of a *de minimis* value in order that they be exempt from regulation. *Id.* Yet, if the press release is indeed of such minimal value, how does it threaten to corrupt the electoral process at all? If the press release is of *de minimis* value, it follows that no threat to the electoral process exists and the additional regulations are not required. Just as the FEC recognizes the fact that *de minimis* use of corporate resources in an "occasional, isolated, or incidental" manner is a non-regulated activity; this very rationale should extend to press releases as well.

Three of the four proposed rules regarding corporate political endorsements regulate political speech in a content-based manner. Electoral speech, as mentioned earlier, is afforded the greatest protection because it is at the heart of the First Amendment. Internet speech should also be afforded a similar level of protection due to its unique medium format. Content-based regulations are presumptively invalid and must pass strict scrutiny to be found constitutional. *Hill v. Colorado*, 530 U.S. 703, 769 (2000). The FEC effectively attempts to regulate the most highly protected speech, in one of the most highly protected media, in the most constitutionally-egregious manner. Because the proposed rules do not directly relate to a compelling governmental interest, e.g. the prevention of corruption, they are unconstitutional because they stifle political speech on the Internet in a content-based manner.

IV. Conclusion

From the analysis conducted above, it is apparent that the proposed rules are underprotective of the free speech rights of those engaged in the political marketplace of ideas. The proposed rules laudably aim to protect general citizens from the potentially overwhelming voice of corporations and labor unions and

purport to save the electoral process from corruption. However, the proposed rules lack any connection to such interests and sweep too broadly, infringing upon individuals free speech rights, in accomplishing their purported aims. For these reasons the proposed rules should be withdrawn and regulation of the Internet should be evaluated consistent with the First Amendment principles annunciated in this comment.

Sincerely,

BOPP, COLESON & BOSTROM

James Bopp, Jr.
Benjamin Barr